89-1712

No. _____



# In the Supreme Court of the United States

OCTOBER TERM, 1990

NORTHWEST FOOD PROCESSORS ASSOCIATION,
a nonprofit association, *et al.*,
*Petitioners,*

v.

WILLIAM K. REILLY, Administrator,
United States Environmental Protection Agency,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether a final order issued by the EPA under Section 136(b) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136(d) (1982), cancelling the registration of an herbicide must be supported by substantial evidence on the record when the order is entered by means of a settlement with the registrants and over the objections of recognized and adversely affected product users for whom no substitute herbicide exists.

## PARTIES TO THE PROCEEDING

The Plaintiffs-Appellants and Cross Appellees in the Court of Appeals (now Petitioners in the Court) were Northwest Food Processors Association, a nonprofit association; Tualatin Valley Fruit Marketing, Inc., an Oregon corporation; American Frozen Food Institute, a nonprofit association; and James M. Love. American Frozen Food Institute was also petitioner for review of the ALJ's decision. Plaintiff-Intervenor (taking no part in this petition) was Dave Frohnmayer, Attorney General for the State of Oregon on behalf of the People of the State of Oregon.

Defendant-Appellee in the Court of Appeals (now Respondent in this Court) was William K. Reilly, Administrator of the United States Environmental Protection Agency. Defendants-Intervenors-Appellees and Cross-Appellants (not a party in this petition) were David Alvarez, Alicia Prieto, Cristina Esquivel; National Coalition Against the Misuse of Pesticides; Northwest Coalition Against Pesticides; Natural Resources Defense Council; United Farmworkers Union of Washington State; and Pineros Y Campesinos Unidos Del Noroeste, Inc.

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The Northwest Food Processors Association, a nonprofit association ("NWFPA"), Tualatin Valley Fruit Marketing, Inc., an Oregon corporation; American Frozen Food Institute, a nonprofit association ("AFFI");[1] and James M. Love, petition this Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment in *Northwest Food Processors Ass'n v. Reilly*, 886 F.2d 1075 (9th Cir. 1989). The respondent is William K. Reilly, Administrator of the United States Environmental Protection Agency.

## OPINIONS BELOW

On June 10, 1988, the EPA administrator issued an order cancelling the registrations for all products containing dinoseb. The order is reprinted at Appendix A150-82. On June 17, 1988, the District Court for the District of Oregon enjoined the cancellation order. *See* Appendix A109-21. On October 4, 1988, the court issued an opinion upholding the cancellation order. Appendix A29-44. The Order (without opinion) of the Ninth Circuit Court of Appeals affirming the final order of the EPA cancelling registrations of dinoseb and permitting the use of existing stocks is reported at 869 F.2d 542 (9th Cir. 1989). The

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[1] Each petitioner has no parent company or subsidiary.

later issued Opinion of the Ninth Circuit is reported at 886 F.2d 1075, and is reprinted at Appendix A3-A23.

## JURISDICTION

This petition arises under, and alleges violations by the Environmental Protection Agency ("EPA") of, the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.* The date of the decision of the United States Court of Appeals for the Ninth Circuit is September 27, 1989. The Ninth Circuit had jurisdiction pursuant to 7 U.S.C. § 136n and 28 U.S.C. § 1631 (1982). On December 8, 1989, a Petition for Rehearing and Suggestion for Rehearing *En Banc* of petitioners was denied. On February 26, 1990 Justice Sandra D. O'Connor signed an order extending the time for filing a petition of certiorari to and including March 19, 1990. This court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 6 of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136(b), provides in relevant part:

> (b) Cancellation and change in classification
>
> If it appears to the Administrator that a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this subchapter or, when

used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, the Administrator may issue a notice of his intent either -

(1) to cancel its registration or to change its classification together with the reasons (including the factual basis) for his action, or

(2) to hold a hearing to determine whether or not its registration should be cancelled or its classification changed.

In taking any final action under this subsection, the Administrator shall consider restricting a pesticide's use or uses as an alternative to cancellation and shall fully explain the reasons for these restrictions, and shall include among those factors to be taken into account the impact of such final action on production and prices of the agricultural commodities, retail food prices, and otherwise on the agricultural economy, and he shall publish in the Federal Register an analysis of such impact.

Section 2(bb) of FIFRA, 7 U.S.C. § 136(bb), provides in relevant part:

(bb) Unreasonable adverse effects on the environment.

The term 'unreasonable adverse effects on the environment' means any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide.

Section 16 of FIFRA, 7 U.S.C. § 136n(b), provides in relevant part:

(b) Review by court of appeals.

In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such

order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business, within 60 days after the entry of such order, a petition praying that the order be set aside in whole or in part. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Administrator or any officer designated by him for that purpose, and thereupon the Administrator shall file in the court the record of the proceedings on which he based his order, as provided in section 2112 of title 28. Upon the filing of such petition the court shall have exclusive jurisdiction to affirm or set aside the order complained of in whole or in part. The court shall consider all evidence of record. The order of the Administrator shall be sustained if it is supported by substantial evidence when considered on the record as a whole. The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28. The commencement of proceedings under this section shall not, unless specifically ordered by the court to the contrary, operate as a stay of an order.

## I. STATEMENT OF THE CASE

### A. INTRODUCTION

This petition concerns a Ninth Circuit opinion on two consolidated cases involving a decision by the EPA Administrator to cancel the registration for the herbicide dinoseb.[2] The cancellation order was affirmed by the

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[2] The consolidated cases are petitioner's appeal from a district court judgment, and petitioner AFFI's petition seeking review of the EPA's final order of cancellation. CR. 84A, AR.

(continued...)

Ninth Circuit. This petition does not challenge the Ninth Circuit's decision that the public hearing requirement of FIFRA was satisfied, or that the Court of Appeals had jurisdiction under 7 U.S.C. § 136n. This petition is solely concerned with whether the Court of Appeals erred in affirming over the objections of petitioners a cancellation order that was based, not on the evidentiary record, but on a settlement with dinoseb manufacturers.

B. **THE IMPORTANCE OF DINOSEB**

When the EPA issued an emergency order suspending the use of dinoseb in October 1987, it relied upon "scanty" data "inconsistent with or contradicted by data readily available to, but not considered by, the EPA." *Love v. Thomas*, 858 F.2d 1347, 1358 (9th Cir. 1988) (quoting *Love v. Thomas*, 668 F. Supp. 1443, 1449 (D. Or. 1987). Appendix A77. Rather than recommence its fact finding effort to support cancellation, the EPA instead negotiated a settlement with the manufacturers. The economic loss in the Northwest alone caused by the EPA cancellation was not less than $9 million.

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(...continued)
169 (Appendix A29-44; A122-49). The district court had original jurisdiction pursuant to 28 U.S.C. § 1331 and 7 U.S.C. § 136n(a). Alternatively, the Ninth Circuit had original jurisdiction of EPA's cancellation order pursuant to 7 U.S.C.§ 136n(b).

In the U.S. District Court, upon review of the final cancellation order, the past chairman of the EPA's Scientific Advisory Panel testified that the administrator's record establishes that, with restrictions, dinoseb may be used at an acceptable level of safety. The past chairman further testified that he would recommend the continued usage of dinoseb. It is also undisputed that there are no known, effective alternatives to dinoseb.

Products containing dinoseb have been registered for sale, distribution and use since 1948. Dinoseb is primarily used as a herbicide to control immature broadleaf weeds. It is also used as a desiccant on caneberry crops to increase berry yields by suppressing the growth of primocanes and to prepare plants for mechanical harvesting.

During the 40 years of registration, dinoseb has been used by members of NWFPA and AFFI on a wide variety of crops including caneberries, red raspberries, boysenberries, blackberries, and loganberries, cucurbits (squash, pumpkin, cucumber and zucchini), snap beans (green beans, wax beans and romano beans), and green peas. The EPA concedes that there is no risk to the consumer of products cultivated in fields where dinoseb has been applied.

The EPA officially recognized the economic dependence on dinoseb and the lack of alternatives in the Administrator's final cancellation order in the provision for the use of existing stocks. Appendix A152. Dependence upon dinoseb and the absence of alternatives to the herbicide render food processors nationally and Northwest farmers in particular, vulnerable to tens of millions of dollars in lost production and income if use of the product is prohibited. Appendix A145-46. One example among many critical uses of dinoseb is the suppression of deadly nightshade so that its green toxic pea-sized berries are not intermingled with the harvest of green peas.

Dinoseb is also used on 90 to 100 percent of all caneberry crops grown in Western Oregon and Western Washington; 90 to 100 percent of all snap beans grown in Western Oregon and Western Washington; 100 percent of all green peas grown in Western Idaho, Western Oregon and Western Washington; 60 to 65 percent of the green peas grown in Eastern Oregon and Eastern Washington; 100 percent of all squash grown in Western Oregon; 100 percent of the cucumbers brown in Western Washington; and 30 percent of the cucumbers grown in Western Oregon. Appendix A127.

In the Northwest, there are 15,750 acres of caneberry crops which produce 95 percent of the nation's total production; 82,200 acres of green pea crops which produce 54 percent of the nation's total production; 24,200 acres of snap bean crops which produce 20 percent of the nation's total production; and 4,550 acres of regional cucumbers and yellow squash. Appendix A126-27.

C. **PROCEDURAL HISTORY**

On October 7, 1986 the Administrator of the EPA issued a notice of intent to cancel all dinoseb registrations together with an emergency suspension order requiring immediate cessation of the use and sale of dinoseb pending proceedings to determine whether the product posed a significant threat to human health and the environment.

Six registrants of dinoseb requested cancellation hearings pursuant to Section 6(c)(2) of FIFRA. During the pendency of the cancellation hearings, four registrants also contested the emergency suspension order. The American Dry Peas and Lentil Association petitioned the EPA for a hearing to reconsider and modify the emergency suspension order to permit the use of dinoseb on dried peas, lentils, and chick peas under certain conditions. The EPA approved the recommendation of the

Administrative Law Judge ("ALJ") to allow the application of dinoseb on these crops on March 30, 1987. Appendix A133.

Two days later, however, the EPA denied a petition to reconsider the use of dinoseb on green peas and snap beans.[1] The latter petition was submitted by the petitioners NWFPA on the basis that there would be significant crop and financial losses if the order were not modified. The EPA denied the petition and ruled that the decision was final. 52 Fed. Reg. 11,119 (1987). 40 C.F.R. § 164.131(b) (1989).

Following protracted litigation over the suspension order, the Ninth Circuit held the EPA had abused its discretion, acting without due regard to the commands of FIFRA:

> By suspending first and asking questions later - if at all - the EPA acted without due regard to the commands of FIFRA. We therefore agree with the district court that the emergency suspension order was arbitrary and capricious, an abuse of discretion, and was not issued in accordance with the provisions of FIFRA

*Love v. Thomas*, 858 F.2d at 1363. Appendix A92.

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[1] Chick peas and lentils are often grown in adjoining fields with green peas. Dry peas and green peas are essentially the same crop.

During the pendency of the appeal from the suspension order, the EPA and two registrants who continued to oppose the cancellation, Cedar Chemical Corp. ("Cedar") and Drexel ("Drexel") Chemical Co., entered into a "Stipulation and Settlement Agreement." This settlement provided for the cancellation of the remaining dinoseb registrations in exchange for the limited use of existing stocks of dinoseb.

At the time these agreements were entered, the manufacturers recorded substantial disagreement with the EPA's assessment of the risk of applying dinoseb. The manufacturers did so in their written objections to the order. The Response of Dinoseb Task Force II To EPA Rationale For Settlement states: "While supporting the terms of the instant settlement, the Task Force substantially disagrees with the Agency's allegations of risk associated with dinoseb use." Appendix A184. AFFI, one of the petitioners in this case, also objected to the cancellation order. NWFPA also sought to have its exceptions to the settlement considered in the final decision-making process.

On March 1, 1988 the ALJ granted the motion by Cedar, Drexel and the EPA for an accelerated decision and cancellation order and approved the settlement. AFFI

filed exceptions to this decision on the basis that the decision to cancel all registrations had not been substantially justified by the EPA and was contrary to the applicable provisions of FIFRA. The Administrator, however, affirmed the ALJ's decision on June 10, 1988 and entered a final order cancelling all remaining registrations for all products containing dinoseb, but permitted temporary use of existing stocks. The Administrator stated in his decision that the settlement rendered a risk assessment for cancellation "legally irrelevant."

Petitioners sought to enjoin the order and, in the event the District Court was found to lack jurisdiction, also filed a precautionary petition for review with the Ninth Circuit. The District Court enjoined the cancellation order on the following finding:

> The evidence of risk suggests that the dangers of dinoseb are far less than assumed by the EPA. Further, before the Administrator can cancel use of a chemical due to unreasonable adverse effects on the environment, he must balance the economic, social and environmental costs and benefits of that action. 7 U.S.C. § 136d(b). This, the EPA has failed to do. Such agency action is arbitrary and capricious.

Opinion of Judge Redden, Appendix A119-20.

On a motion for summary judgment filed by the EPA, the District Court subsequently reversed itself, finding

that it lacked jurisdiction. On the merits, the District Court pierced to the heart of the issue:

> I believed then, and believe now that the Administrator went 'end around' and thereby avoided complying with the detailed requirements of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, but have concluded that such is the option which the Administrator may legally choose under the statute.

Appendix A34. The appeal to the Ninth Circuit followed, which is the subject of this petition.

## II. REASONS FOR GRANTING THE WRIT

### A. INTRODUCTION

This case concerns whether an agency has discretion to circumvent express statutory provisions in a multi-party contested case through bi-lateral settlement. The Administrator contends that his cancellation order is valid as a matter of law because it was based on a settlement and that no evidentiary record is required:

> The decisions of the two registrants to have EPA cancel their product registrations makes weighing the risks of continued dinoseb use against its benefits legally irrelevant in deciding whether the registrations should be cancelled.

Appendix A165.

Neither the EPA nor the Ninth Circuit has explained what law permits the EPA to ignore explicit requirements of FIFRA that a risk assessment be conducted before a

final cancellation order is issued in a contested proceeding. 7 U.S.C. § 136d(b)(1) and (2).

Petitioners do not challenge the Ninth Circuit holding that a public hearing was conducted prior to the issuance of the final order or that the record is ripe for review. *Northwest Food Processors Ass'n v. Reilly*, 886 F.2d at 1078. Petitioners do not here challenge the finding, based on *McGill v. Envtl. Protection Agency*, 593 F.2d 631 (5th Cir. 1979), that the processors may not prevent a settlement and force further proceedings. 886 F.2d at 1079. Nor do petitioners challenge the EPA's asserted right to achieve the cancellation of a pesticide by means of settling with the manufacturers.

Petitioners contend, however, as they did before the Ninth Circuit, that a final cancellation order must be based on a competent risk assessment as required by FIFRA, whether the cancellation is arrived at by settlement in a contested proceeding after a public hearing or by full scale adjudication. 7 U.S.C. § 136d(b)(1) and (2), § 136n.

There is no question that users and processors are within the class of persons whose interests are sought to be protected by FIFRA:

> The legislative history suggests that the rights of non-registrants were recognized in the statute because certain Congressmen were concerned that a pesticide producer would choose not to defend a particular registration that was of small importance to the manufacturer, but of great importance to a particular agricultural group.

*McGill v. Envtl. Protection Agency*, 593 F.2d at 635.

This case presents the very dilemma that prompted Congress to ensure the rights of users and producers. Petitioners therefore simply seek to enforce a statute which requires the EPA to demonstrate that the risks of continued usage outweigh the benefits before it issues *any* final cancellation order. Congress did not intend, and FIFRA does not allow, an exception to this requirement if the Agency's final cancellation order is entered pursuant to an agreement with the manufacturer.

### B. THE STRUCTURE OF THE STATUTE

Nowhere does FIFRA grant EPA the authority to settle a contested cancellation proceeding to the detriment of recognized third parties without an assessment that the product causes an unreasonable risk to the environment and without addressing the economic impact of the cancellation. The EPA contends it has this right as a matter of law. This contention is not supported by the language of the statute, nor may it reasonably be inferred from the language which specifically requires contested

cancellation orders to be based on competent evidentiary findings.

1. **The Relevant Provisions**

FIFRA requires that all pesticides sold or distributed in the United States be registered by the EPA. 7 U.S.C. § 136a. The statutory standard for registration requires that a pesticide "will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. § 136a(c)(5)(D).

A registration may be cancelled automatically or as the result of affirmative action on the part of the Administrator. A registration may be cancelled automatically five years after issuance, or at the end of any five-year period thereafter, unless the registrant or other interested persons with the concurrence with the registrant, requests continuance of the registration. 7 U.S.C. § 136d(a)(1).

The Administrator may initiate proceedings to cancel the registration if it appears that the pesticide or its labelling does not comply with FIFRA, or, if the pesticide generally causes unreasonable adverse effects on the environment. 7 U.S.C. § 136d(b)(1).

The term "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man

or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb).

The Administrator must issue a notice of intent to cancel the registration which is sent to each affected registrant and published in the Federal Register. The cancellation of each affected product becomes final and effective automatically unless a person "adversely affected" by the notice requests a hearing within the specified time period. 7 U.S.C. § 136d(b).

If a timely and valid hearing request is received, a hearing will be conducted by a hearing examiner or ALJ. 7 U.S.C. § 136d(d). In taking *any* final action regarding cancellation or changes of classification, the Administrator shall explain the reasons for the restrictions and include factors of economic impact. 7 U.S.C. § 136d(b)(2).

Section 136d also permits the Administrator to issue an emergency order suspending the registration of a pesticide if the Administrator determines that the pesticide poses an imminent hazard to human health and further considers restricted use together with the impact of the emergency order on production and prices of agricultural commodities, retail food prices, and otherwise on the

agricultural economy, and publishes an analysis of such impact in the Federal Register. 7 U.S.C. § 136d.

Section 16 of FIFRA provides that in the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by the order who had been a party to the proceedings may obtain judicial review in the United States Court of Appeals. 7 U.S.C. § 136n(b).

The Administrator shall file in the court a record of the proceedings on which he based his order, and that the court "shall consider all evidence of record." *The order of the Administrator shall be sustained if it is "supported by substantial evidence when considered on the record as a whole."* *Id.* (emphasis added).

The judgment of the court affirming or setting aside, in whole or in part, any order under this section shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification. *Id.*

No provision in FIFRA authorizes the Administrator to cancel a registration without first having to decide whether continued use of an herbicide causes unreasonable adverse effects on the environment.

### 2. The EPA Contends the Requirement for Risk Assessment Is Legally Irrelevant

Contrary to the provisions cited above, the EPA has repeatedly taken the position that no evidentiary record is required to order cancellation in view of the settlement. The EPA stated:

> In its proposed reply, AFFI restates its prior argument that EPA is required to assemble an evidentiary record to justify its prosecutorial decision to adhere to the regulatory position set forth in the Administrator's original notice of intent to cancel dinoseb products. However, it has been the Agency's consistent position that it is entitled to entry of an accelerated decision cancelling all remaining dinoseb registrations as a matter of law. *The remaining dinoseb registrants have decided to accept cancellation of their registrations, and neither a hearing nor any sort of evidentiary record is required for the Administrator to take legal cognizance of this simple and undisputed fact.*

(Ex. 426, Respondent's Opposition to AFFI Motion for Leave to File Reply Memorandum, FIFRA Docket Nos. 590, et al; AR 167.)

This position is reiterated in the Administrator's Final Order in which he states: "The decisions of the two registrants to have EPA cancel their product registrations makes weighing the risks of continued dinoseb use against its benefits legally irrelevant in deciding whether the registrations should be cancelled." Appendix A165. The EPA's position is wholly unsupported by the

language of FIFRA and contrary to the public policy and spirit of the Act.

### C. THE SETTLEMENT WAS NOT A UNILATERAL ACT ON THE PART OF THE MANUFACTURERS

The EPA Rationale for Settlement states that cancellation was a precondition for settlement. In effect, the EPA bought out the manufacturers by offering to permit sales of existing stocks in exchange for cancellation. The manufacturers' authority to sell registered products is entirely dependent upon decisions made by the EPA as a regulatory agency.

The EPA persists in confusing a voluntary act with a unilateral act. This case concerns the cancellation of a registration of a product which bans any further sale and use. An EPA-imposed ban resulting from a cancelled registration is quite separate from a manufacturer's unilateral decision to cease production.

Petitioners make no claim that manufacturers are required to continue to manufacture dinoseb. Petitioners contend only that before banning a product the EPA must competently determine that the product poses an unreasonable risk and that a reviewing court affirm the decision only if it is supported by substantial evidence on the record as a whole.

## D. THERE ARE GENUINE ISSUES OF MATERIAL FACT

The only authority the EPA has cited to support the contention that the order is valid as a matter of law is 40 C.F.R. § 164.102(a). That regulation is inapplicable. The regulation states: If "there is no genuine issue of any material fact and . . . the respondent [the Agency] is entitled to judgment as a matter of law," the ALJ is authorized by FIFRA rules of practice to recommend an accelerated decision. Certainly, if there is no issue of fact as to whether a pesticide poses an "unreasonable risk to man" (7 U.S.C. § 136(bb)), then this regulation would permit an accelerated decision.

However, the manufacturer's consent to cancellation does not have the effect of removing any issue of fact about the EPA's suspicion of an unreasonable risk to man. Indeed, the settling registrant manufacturers objected to the EPA's estimation of risk. Through the Dinoseb Task Force II Response to the EPA Rationale for Settlement, the settling registrants entered their factual objections on the record at the time the settlement agreement was reached:[1]

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[1] The manufacturers commissioned the Dinoseb II Task Force to study the effects of dinoseb on humans as recommended by the EPA Scientific Advisory Panel.

> While supporting the terms of the instant settlement, the Task Force substantially disagrees with the Agency's allegations of risk associated with dinoseb use . . .. Notwithstanding its disagreement with EPA's assessment of dinoseb risks, the Task Force joins in the settlement based on several factors, including the terms of the settlement regarding use of existing stocks and . . . indemnification and disposal. A further primary basis for the decision to settle is the Task Force's assessment of the resources that would be required to make its case for continued registration of dinoseb in the cancellation hearing.

Appendix A184-85.

Petitioners in this suit also filed objections to the settlement and order on the basis that dinoseb did not pose a risk and that economic considerations must be weighed. The EPA's estimation about the possible risk of dinoseb has been and continues to be in genuine dispute.

### E. CONTESTED SETTLEMENTS MUST BE BASED ON EVIDENCE

Petitioners agree that the EPA may negotiate a settlement with manufacturers as a means of entering a final cancellation order on an accelerated basis. However, it was an abuse of the Agency's discretion under FIFRA to find "weighing the risks of continued dinoseb use against its benefits legally irrelevant . . .." Appendix A165. In fact, the evidentiary record then before the EPA was replete with substantial evidence that dinoseb does *not*

pose an unreasonable risk to man. The EPA did not assess that record. It instead found the record "legally irrelevant."

Contrary to EPA's contention, the evidentiary record must be considered in approving a settlement agreement:

> [A] settlement proposal in a proceeding like the instant one is in the nature of a motion for summary judgment, and the agency may reach such a judgment on such terms as it *deems fair from the evidence before it*. The standard for judicial review of an administrative order amounts to a resolution of the issue on the merits, that is *whether the Commission has made an independent rate determination supported by substantial evidence on the record as a whole.*

*Consolidated Gas Supply Corp. v. Fed. Energy Regulatory Comm'n*, 606 F.2d 323, 330 (D.C. Cir. 1979) (emphasis added; citation omitted). The EPA never made an independent risk determination relating to cancellation prior to or at the time of the settlement.

### F. THE EPA MUST ENFORCE THE STATUTE AND NOT A PROMISE

The principle underlying the EPA order and the decision of the Ninth Circuit conflicts with a principle previously espoused by this Court. An agency acts to enforce a statute and not a promise when it enters an order. The authority to enter an order based on a settlement agreement "comes only from the statute which the decree is intended to enforce," not from the party's

consent to the decree. *System Fed'n No. 91 v. Wright*, 364 U.S. 642, 651 (1961).

This Court has held that consent decrees and administrative orders should be treated as judicial acts and not as contracts. *United States v. Swift*, 286 U.S. 106 (1932); *Firefighters v. Stotts*, 467 U.S. 561 (1984); *System Fed'n No. 91 v. Wright*, 364 U.S. 642 (1961); *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975). The same principle applies directly to an administrative order based upon a settlement agreement.

In *Wright* this Court held that it was the Railway Labor Act, and only incidentally the parties, that the district court served in entering the consent decree. *Wright*, 364 U.S. at 651. The district court abused its discretion by refusing to modify the consent decree between nonunion employees and the railway when there was a change in the statutes and the union challenged the decree as a third party.

More recently, in *Firefighters v. Stotts*, 467 U.S. at 497, this Court held that a court cannot enter a disputed consent decree if the resulting order is inconsistent with the statute under which it is entered. In *Stotts*, the dispute was also over a modification to a decree.

Based on the principles of these cases, the EPA has an obligation to enforce the statute and not a promise with the registrant manufacturers. These cases instruct us that the EPA cannot enter an order based on a settlement that is inconsistent with the statute under which it is entered. It is inconsistent to enter a contested order based solely on a settlement in defiance of a statute which requires that any cancellation order be based on a risk assessment and evaluation of economic factors. 7 U.S.C. § 136d(b)(1) and (2).

### G. THE NINTH CIRCUIT FAILED TO REVIEW THE RECORD TO DETERMINE WHETHER THE CANCELLATION ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE

The EPA position is also inconsistent with the statutory provision for judicial review in FIFRA. 7 U.S.C. § 136n. FIFRA mandates that contested final cancellation orders are subject to judicial review. 7 U.S.C. § 136d(f) and 136n. An administrator's final decision shall be upheld if it is supported by substantial evidence on the record as a whole pursuant to 7 U.S.C. § 136n.

Furthermore, FIFRA is consistent with other interpretations of the approval and review of administrative orders arising out of contested settlements:

> The standard for judicial review of an administrative order arising out of the submission of a contested settlement proposal is whether the order amounts to a resolution of the issue on the merits, that is, whether the commission has made an independent rate determination supported by substantial evidence on the record as a whole.

*Consolidated Gas Supply*, 606 F.2d at 330.

Petitioners contend that any final cancellation order arising out of a settlement must resolve the issue of risk on the merits. EPA failed to do this, finding the weighing of risks and benefits "legally irrelevant." The Ninth Circuit, following the EPA's lead, also failed to review the record to determine whether cancellation was supported by an adequate risk benefit analysis. The Ninth Circuit instead adopted the Agency's interpretation of FIFRA making moot any review of the merits of the alleged risk posed by dinoseb. The EPA's position makes a mockery of the statutory recognition of the rights and interests of third parties in contested proceedings. The EPA position also vitiates the substantive review process and conflicts with the fundamental principle that final administrative actions are presumed reviewable. *Love v. Thomas*, 858 F.2d at 1363; *Kola, Inc. v. United States*, 882 F.2d 363 (9th Cir. 1989).

This Court has required parties seeking to avoid review to show that the statute reveals the legislature's

intent to prohibit review. *Block v. Comm. Nutrition Inst.*, 467 U.S. 340 (1984); *Southern Ry. Co. v. Seaboard*, 442 U.S. 444 (1979); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). No such intent exists here.

The requirement for substantive review based on the merits of a factual evidentiary record is codified in FIFRA. The statute requires the reviewing court to consider the record as a whole. 7 U.S.C. § 136n. Yet, according to the Agency and the Ninth Circuit's opinion adopting the agency's view, the evidentiary record is somehow "legally irrelevant."

## III. THE IMPORTANCE OF THE CASE

The woeful inadequacy of the scientific basis for the EPA's original suspension order, *Love v. Thomas*, has not been corrected. Despite the evidence in the record and the objections of adversely affected parties, the EPA did not cure an estimation of risk deemed arbitrary, capricious and in violation of FIFRA. *Love v. Thomas*, 858 F.2d at 1363. Even the EPA's own past chairman of the Scientific Advisory Panel testified at the preliminary injunction hearing that dinoseb should not have been cancelled.

The Dinoseb Task Force II objected on the record to the "Agency's allegations of risk associated with dinoseb

use" (Appendix A184) notwithstanding their acquiescence in the terms of the settlement. The manufacturers' decision was not a unilateral decision to cease manufacture of the product. It was the result of the business judgment of one special interest group that took exception on the record to the risks alleged by the EPA. Petitioners also filed their objections with the EPA challenging the scientific merit of cancellation.

The merit of the cancellation order was genuinely in dispute. And, there is no question that the final order cancelling dinoseb has grave and significant consequences for much of our agricultural industry. Crop losses resulting from discontinued use of dinoseb

> "will result in business failures not only for farmers, but for the food processing industry as well." These losses were not included in the $39.2 million estimate, which covered only the losses to [raspberry] growers. . . . The effect of crop losses growing from discontinued use of dinoseb thus could seriously harm the entire regional economy.

*Love v. Thomas*, 858 F.2d at 1361. Appendix A86-87.

Petitioners do not challenge the right of the EPA to negotiate a settlement as a means of entering a final cancellation order. Nor do petitioners contend that they have the right to force a full adjudicatory cancellation hearing where the Agency achieves cancellation by means of a

settlement. The question in this case is whether a decision to cancel a registration must be based on competent scientific evidence. 7 U.S.C. § 136d(b)(1) and (2), § 136n.

EPA contends it may cancel a registration without regard to scientific merit or economic impact. The statute requires the EPA, however, to base *any* cancellation order on substantial evidence of an unreasonable risk of adverse effects on the environment and the economy. 7 U.S.C. § 136d(b)(1) and (2), § 136d. This mandate therefore applies to orders resulting from contested settlements or from adjudications.

All economic and environmental interests in the use or cancellation of agricultural products are ultimately controlled by the EPA. Because a manufacturer may choose not to defend a registration of great importance to agriculture, *McGill v. Envtl. Protection Agency*, 593 F.2d at 635, the decision of the Ninth Circuit removes from judicial and public scrutiny EPA settlements which may not be defensible under the strict fact finding requirements of FIFRA.

The Ninth Circuit's decision directly conflicts with the principle espoused by this Court that the agency derives its authority from the statute and not from the consent of

the parties to a settlement agreement. *Wright*, 364 U.S. at 651. There is simply no statutory or legal basis for the EPA position that risk assessment is "legally irrelevant." Without such authority, it is incomprehensible how the EPA can claim the order is valid as a matter of law.

By adopting the EPA's interpretation of FIFRA, the Court of Appeals failed to assure that the final cancellation order was supported by substantial evidence on the record as a whole. 7 U.S.C. § 136n. The cancellation order was not lawful simply because the manufacturers, while objecting to the EPA's estimation of risk, agreed to cancellation. The lawfulness of that order is tested instead by the requirements of the EPA's enabling statute, not by the consent of a registrant.

The significance of this case extends far beyond the provisions of FIFRA or the power of the EPA. The discretionary power claimed by the EPA in this case challenges the nature of our system of checks and balances and proclaims authority to buy out special interests, as a matter of law, ignoring the interests of other parties to the proceedings. The EPA position, adopted by the Ninth Circuit, eliminates the role of the judiciary in reviewing for abuse of discretion and in determining whether a cancellation is based on the merits.

Congress did not intend through FIFRA to invest the executive branch with power to ignore its statutory directives and to do so free of substantive judicial review. Instead, Congress intended that its standards be applied and provided for substantive judicial review to assure that those standards are applied, and applied fairly.

## CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed and remanded to determine whether the Administrator's cancellation order is supported by substantial evidence on the record as a whole pursuant to the provisions of FIFRA.

Respectfully submitted,

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